## UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD

MASSEY ENERGY COMPANY AND ITS SUBSIDIARY, SPARTAN MINING COMPANY D/B/A/ MAMMOTH COAL COMPANY

And

Case 9-CA-42057

UNITED MINE WORKERS OF AMERICA

## RESPONSE OF UMWA TO NLRB'S INVITATION TO FILE BRIEF

#### I. INTRODUCTION

Invitation to File Briefs ("Invitation"), issued on March 17, 2001. Administrative Judge Paul Bogas, in a Decision issued on November 21, 2007, found that the record evidence demonstrated that Respondent Massey Energy Company ("Massey Energy") and its subsidiaries, including Respondent Spartan Mining Company d/b/a Mammoth Coal Company ("Mammoth"), constituted a "corporate family" that "function(ed) as a single production entity..." (See Exhibit 1, at p. 10). Judge Bogas found Massey Energy and Mammoth liable for violations of Sections 8(a)(3) and 8(a)(5) of the Act pursuant to the "direct participation" theory of liability. *Id.* For reasons set forth below, the UMWA maintains that the NLRB may and should, at this juncture, consider the single employer question as an alternative theory of Massey Energy and Mammoth's liability for the unlawful conduct enumerated in the Complaint and the Administrative Law Judge's findings of fact. The UMWA thus contends that an affirmative response is appropriate to

<sup>&</sup>lt;sup>1</sup> The procedural posture of this case is set out in the NLRB's Invitation.

the three questions posed by the Invitation, namely 1) given the procedural circumstances of this case, does the Board have the authority to consider whether Massey and Mammoth constitute a single employer under existing Board law; 2) if so, should the Board exercise its authority; and 3) if the Board can and should consider the single-employer theory of liability, does the existing record in fact establish that Massey and Mammoth constitute a single employer?

The instant case, like *Payless Drug Stores Northwest*, 312 NLRB 972 (1993) cited in the NLRB's Invitation, is one in which an alternative theory of liability (in *Payless*, the theory of discriminatory disparate treatment, and here, the single employer relationship between Massey Energy and Mammoth) was fully litigated. Judge Bogas's choice of the "direct participation" theory of liability, while sound and appropriate, does not preclude the NLRB from reviewing the record evidence and the ALJ's findings of fact in the context of the alternative "single employer" theory of liability. The question of whether Massey Energy and Mammoth constituted a single employer is one that has been present from the start of this litigation. As Judge Bogas himself noted in fn. 9 of his Decision:

"Massey argues that these legal standards (pertaining to single employer and 'direct participation' theories of liability) for parent company liability were not set forth in the amended complaint. The amended complaint, however, alleges that Mammoth is a subsidiary of Massey, that Massey performs various administrative services for its subsidiaries, that Massey and Mammoth have been acting for and on behalf of each other," and are "agent of each other" and that both Respondents committed unfair labor practices that affect commerce. On the first day of the trial, counsel for the General Counsel took the position that Massey and Mammoth were both part of "one big ball of wax". Tr. 159. At any rate, in its brief, Massey discusses the legal standard for parent company liability, but cites to no types of evidence regarding its interrelation with Mammoth, or involvement in the alleged unfair labor practices, that it did not introduce, but would have, if the complaint had been precise about the applicable legal standard. Br. R. Massey at p. 10. Based on my review of the entire

record, I conclude that Massey's involvement in, and potential liability for, the alleged unfair labor practices has been fully litigated.

- II. THE BOARD HAS THE AUTHORITY TO CONSIDER WHETHER MASSEY AND MAMMOTH CONSTITUTE A SINGLE EMPLOYER UNDER EXISTING NLRB LAW, AND SHOULD EXERCISE THAT AUTHORITY IN THIS CASE.
  - A. The UMWA's Unfair Labor Practice Charge, the Complaint and Amended Complaint, the Record of the Hearing Before the Administrative Law Judge, and the Post-hearing Briefs Filed by the Parties All Establish That Massey Energy Company and Mammoth Coal Company Were on Notice of Their Joint and Several Liability for the Alleged Unlawful Conduct. Further, their Liability as a Single Integrated Entity Was Fully Presented to Judge Bogas and the Abundant Evidence Cited in His Decision Fully Supports an NLRB Determination That Massey Energy and Mammoth Have Liability as a Single Employer Entity.

In the instant case, the NLRB's determination of Massey Energy's liability as a single employer with Mammoth for violations of Section 8(a)(3) and 8(a)(5) of the Act finds firm footing in the charge filed by the UMWA, in the Amended Complaint issued in this case, in the adjudication of the case before Administrative Law Judge Paul Bogas, and in the post-hearing briefs submitted by the parties.

- 1. The <u>charge</u> filed by the UMWA alleged that <u>the employer</u>, <u>Massey</u>, whose address was given as "Mammoth Coal Company, Leivasy, West Virginia", reopened the Mammoth Coal Mine and related facilities and engaged in discriminatory hiring practices with respect to former UMWA-represented miners that had previously worked at the facilities, in violation of Sections 8(a)(3) and 8(a)(5) of the Act. (See <u>Exhibit 2</u>, attached).
- 2. The <u>original Complaint</u> issued by NLRB Region 9 on August 18, 2006, put Massey Energy on notice, in the opening paragraph, that it and its

subsidiary Mammoth, were regarded as a single Respondent engaged in the enumerated unfair labor practices. (See Exhibit 3a, attached). The Amended Complaint (Exhibit 3b; attached), in the opening paragraph, put Massey Energy on notice that, along with Mammoth, the companies collectively as Respondents engaged in the alleged unfair labor practices. Paragraph 5(a) of the Complaint alleged that the companies "have been agents of each other, acting for and on behalf of each other." Paragraph 5(b) of the Complaint named numerous individuals alleged to be "supervisors of Respondents" and/or "agents of Respondents", including Kyle Bane and Jennifer Chandler as Human Resource Managers of Massey Energy subsidiary Massey Coal Services; Don Blankenship as Chairman, CEO and President of Massey Energy; Dave Hughart as President of Mammoth and of Massey Energy subsidiary Green Valley Coal Co.; and Katharine Kenny as Massey Energy's Director of Investor Relations. The Remedy sought by the Complaint included an order requiring both Massey Energy and Mammoth to rescind the unlawfully imposed terms and conditions of employment, to bargain with the UMWA, and to make unit employees whole for losses.

Finally, at the close of the hearing, Judge Bogas deferred the General Counsel's motion to amend the Complaint to conform with the evidence presented; Judge Bogas did not rule on the General Counsel's motion in his decision. (See Exhibit 4 [transcript], at pp. 3811).

- 3. The presentation of evidence and the litigation of the case before the ALJ amply demonstrates that Massey Energy and Mammoth had notice of their potential liability as a single, integrated entity.
  - At the commencement of the hearing, Counsel for the General Counsel in his opening statement recited his intent to prove that "Massey took possession of the operations and engaged in the initial hiring of employees, provided human relations and labor law services from its subsidiary Massey Coal Services, and generally is intertwined with Respondent Mammoth's operations. Indeed, in much of its communication with the public, with shareholders internally, and in SEC filings, the entire group of corporations is not differentiated and is simply referred to as 'Massey'." (Exhibit 4 [transcript], attached, at p. 28). He characterized the Massey Energy-Mammoth relationship as "on ball of wax . (*Id.* at 156).
  - Section III ("The Massey Organization") of Judge Bogas's

    Decision recites a multitude of factual findings addressing the analytical
    elements of the single employer relationship, and provides in many instances
    transcript and exhibit citations. A review of the Decision demonstrates the
    volume of evidence submitted by the parties on the question of the
    interrelatedness of the companies and their potential for common single
    employer liability for the unfair labor practices complained of. The ALJ's
    findings include his consideration of evidence of Massey Energy's assignment
    of its corporate personnel to interview prospective Mammoth miners and its
    control over their employment opportunities and staffing, Massey Energy's

control of Mammoth's anti-union message and anti-union campaign, the integrated employment of management and supervisory personnel among Massey Energy subsidiaries, and the corporate control over all manner of labor relations such as the job application and job training process, levels of wages and benefits, and transfers of miners among subsidiaries.

- 4. Finally, the post-hearing briefs submitted by the General Counsel, by Massey Energy and by Mammoth each acknowledge the presence of the issue of the single employer relationship between the companies.
  - The opening pages of the General Counsel's Post-Hearing Brief (Exhibit 5, attached, at pp. 2, 52-56, 70-71) addresses the core issue of whether both Massey Energy and/or Mammoth engaged in the enumerated violations of Sections 8(a)(1) and (3) of the Act; whether the two companies constituted a successor employer to Horizon and were thus liable for the alleged violations of Section 8(a)(5) of the Act; and whether the relationship between Massey Energy and Mammoth was one in which each was responsible "for the actions of the other." Section VI of the General Counsel's brief addresses Mammoth and Massey Energy's relationship in the context of a single employer inquiry, and cites to evidence of centralized control of labor relations, common management, interrelation of operations, and common ownership, in the context of applicable case law. The General Counsel's brief seeks a makewhole remedy and a bargaining order jointly against both Respondents. Throughout the brief, the General Counsel seeks a finding that Respondents together are liable for all of the alleged unlawful conduct.

- Massey Energy's Post-Hearing Brief (Exhibit 6, selected pages, attached), while contending that the Complaint and Amended Complaint did not specifically assert a single employer relationship between the companies, addresses the issue and argues that the evidence presented at trial did not prove the necessary control to support a single employer determination.

  Massey Energy argues, at p. 17, that "the concepts of agency and 'single-employer' are distinguishable, and the determination that a parent and subsidiary are a 'single-employer' does not render that parent and subsidiary principal and agent…"
- Mammoth's Post-Hearing Brief (Exhibit 7, p. 36, attached) devotes the opening section of its argument to the question of the control the Respondents exercised over each other, and acknowledges that "The General Counsel introduced a great deal of evidence of commonality between Massey and its subsidiaries, and (made) reference to all of them as a single entity." (emphasis supplied). While arguing that the evidence is irrelevant, Mammoth's brief describes the volume of such evidence as "huge." (Id.)
- B. As a Matter of Law, Massey Energy and Mammoth's Rights of Due Process Have Been Fully Met, and it is the NLRB's Proper Function to Determine Whether Liability May Attach Not Only Under the "Direct Participation" Theory Utilized by Judge Bogas, but under an alternative Single Employer Theory as Well.

A case may have a "proliferation of grounds for finding (a Respondent's conduct) unlawful," having the potential to "make a tangle of what would otherwise be a straightforward case." See, *Banta v. NLRB*, 686 F.2d 10, 16 (D.C. Cir. 1982), cert. denied 460 U.S. 1082 (1983). The guiding analysis is straightforward, however. So long

as the allegations of the Complaint put the Respondent on notice of the conduct at issue and the remedies sought, or the Respondent is put on notice at the hearing and has the opportunity to fairly litigate the issues and present a defense, the NLRB's remedial order will be upheld. *Id.* at 17. Procedural due process is measured against the test of fairness under the circumstances of the particular case, and so long as the Respondent understood the issue and was afforded full opportunity to litigate the conduct alleged to violate the Act, the requirements of due process will have been met. *Id* at 23, *citing NLRB v*. *Mackay Radio & Telegraph Co.*, 304 U.S. 333, 350 (1938) ("While the respondent was entitled to know the basis of the complaint against it, and to explain its conduct in an effort to meet that complaint, we find from the record that it understood the issue and was afforded full opportunity to [defend against the allegations of unlawful conduct])..."

The NLRB's determination of a respondent's liability may rest upon the allegations raised by the General Counsel's complaint or upon those litigated at the hearing before the Administrative Law Judge. *NLRB v. Blake Construction Co.*, 663 F.2d 272, 279 (D.C. Cir. 1981); *Banta v. NLRB*, *supra* at 10. Section 10(b) of the NLRA provides that an NLRB complaint "may be amended by the ... Board in its discretion at any time prior to the issuance of an order based thereon," and the Board thus has the authority to allow the amendment of a Complaint to conform to the proof presented at the hearing so that it can effectively discharge its duty. In this case, the General Counsel made that motion at the close of the hearing, and Judge Bogas allowed it, though he neglected to act upon it in his decision after deferring at the hearing. (See Exhibit 4 [transcript] at pp. 3810-12). It is well settled that "a complaint before the Board is not judged by rigid pleading rules. A finding not based on a charge in the complaint will be

enforced if the issue was fully and fairly litigated at the hearing." Raven Services Corp. v. NLRB, 315 F.3d 499, 501 (5<sup>th</sup> Cir. 2002), citing Huck Mfg. Co. v. NLRB, 693 F.2d 1176, 1187 (5<sup>th</sup> Cir.1982). See also, Rea Trucking Co. v. NLRB, 439 F.2d 1065, 1066 (9<sup>th</sup> Cir. 1971).

It is thus not necessary for allegations, and in particular theories of liability, to be pled with specificity. Rather, the matter litigated must fall within the scope of the complaint so that the respondent has sufficient opportunity to fairly try the issues in question at the administrative hearing. Although it is the function of the NLRB General Counsel to manage the prosecution of the Complaint, it is the Board that is charged with the judicial and policymaking function of determining which issues are within the scope of a complaint. The Board "has an obligation to decide material issues which have been fairly tried by the parties even though they have not been specifically pleaded." *Banta* at 23, fn.17, quoting *American Boiler Mfg. Ass'n v NLRB*, 404 F.2d 547, 556 (8<sup>th</sup> Cir. 1968), cert denied, 398 U.S. 960 (1970).

As discussed more fully above, the Amended Complaint sought to hold both companies responsible for the alleged unfair labor practices, and Respondents had notice from the start and throughout the case that the General Counsel would pursue that broad scope of liability based upon the relationship that Massey Energy and Mammoth had to each other. This adjudicatory process was in no way diminished by the fact that after the Complaint issued and the case was presented and briefed, the Administrative Law Judge ultimately chose the "direct (parent corporation) participation theory" to find Massey

<sup>&</sup>lt;sup>2</sup> Cf. Buonadonna Shoprite LLC (UFCW Local 1500), 356 NLRB No. 115 (2011) [Respondent did not receive due process where ALJ independently took it upon herself to decide an issue not within the scope of the allegations and for which no arguments had been presented in the course of the administrative hearing).

Energy directly liable for causing its subsidiary to engage in unfair labor practices. There can be no doubt that the companies were on notice at the time of the hearing of the potential single employer liability for the unfair labor practices, and there can be no doubt that they had the opportunity to present their case. The NLRB has the power to review the record and make a determination of single employer liability at this time, and the UMWA urges that it do so.

# III. The Existing Record Establishes that Massey and Mammoth Constitute a Single Employer.

Under current Board law, in applying a single employer paradigm to the facts of a case presented, the Board has noted that:

"[T]he fundamental inquiry is whether there exists overall control of critical matters at the policy level". (citations omitted)

. . .

The controlling criteria set out and elaborated in Board decisions, are inter-relation of operations, common management, centralized control of labor relations and common ownership. (citations omitted) Covanta Energy Corporation, 356 NLRB No. 98 (Slip. Op, at 21-22 (2/25/2011)

As noted above, the General Counsel's brief analyzed at length the evidence supporting a finding of a single employer relationship and the applicable case law, and the UMWA respectfully directs the NLRB's attention to that submission. (See Exhibit 5 at pp. 52-56). The UMWA further submits that a review of the Administrative Law Judge's detailed factual findings clearly demonstrates that the evidence of the Respondents' single employer relationship, and particularly of Massey's control of critical matters, is overwhelming and irrefutable. Accordingly, the existing record establishes that Massey Energy and Mammoth constitute a single employer, and the NLRB may and should so find.

### IV. <u>CONCLUSION</u>

For all these additional reasons and authority cited, it is respectfully submitted that the existing record establishes Massey's liability under any theory; and as such, the decision of the Administrative Law Judge should be affirmed and adopted, <u>in toto</u>.

Respectfully submitted,

Charging Party, UMWA By Counsel

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### **CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on this 1944 day of April, 2011, a copy of the foregoing RESPONSE OF UMWA TO NLRB'S INVITATION TO FILE BRIEF was served via e-mail and U.S. first-class mail, postage prepaid, upon:

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